UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT S. SASH, Plaintiff,	07 Civ. 5536 (SHS) (JCF)
- against -	REPORT AND RECOMMENDATION
DIANNE PLUMMER, DEFENDANT DOE #1, CHRISTOPHER STANTON, DEFENDANTS DOE #2 TO #10, UNITED STATES PROBATION DEPARTMENT for the SOUTHERN DISTRICT OF NEW YORK, Defendants.	

TO THE HONORABLE SIDNEY H. STEIN, U.S.D.J.:

Eliot Sash brings this action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging that the defendants negligently prepared his pre-sentence report and consequently violated his constitutional rights in several ways. At the time of the filing of the complaint, Mr. Sash was an inmate at the Metropolitan Detention Center in Brooklyn, New York, and was granted permission to proceed in forma pauperis. Because Mr. Sash has previously filed at least three frivolous actions, I recommend that his in forma pauperis status be revoked and his complaint be dismissed without prejudice to his commencing an action after paying the filing fee.

Background

On October 17, 2007, the defendants applied for an extension of time to respond to Mr. Sash's complaint and for an order that

would allow the United States Attorney's office to access Mr. Sash's pre-sentence report. (Letter of David Bober dated Oct. 17, 2007 ("Bober 10/17/07 Letter"), at 1-2). In that letter, the defendants also asserted that Mr. Sash should have been denied in forma pauperis relief since he had filed more than three frivolous claims in federal court. (Bober 10/17/07 Letter at 2-3). I granted the defendants' application for an extension of time and access to the pre-sentence report and ordered Mr. Sash to explain by October 31, 2007 why his in forma pauperis status should not be revoked. (Order dated Oct. 18, 2007). Mr. Sash acknowledged receipt of the defendants' October 17 letter, but he did not explain why he was entitled to proceed in forma pauperis. (Letter of Eliot S. Sash dated Oct. 22, 2007).

Discussion

A. "Three Strikes" Provision

The "three strikes" provision of the Prison Litigation Reform Act provides that an incarcerated person cannot proceed in forma pauperis if "the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g)). "An appeal is frivolous when it "'lacks an arguable basis either in

law or in fact.'" Tafari v. Hues, 473 F.3d 440, 442 (2d Cir. 2007) (quoting Neitzke v. Williams, 490 U.S. 319, 325 (1989)). The imminent danger exception applies when the danger exists at the time the complaint is filed. Malik v. McGinnis, 293 F.3d 559, 562—63 (2d Cir. 2002). A prisoner cannot proceed in forma pauperis, therefore, if he has filed three or more actions that have been dismissed for failure to state a claim or because they "lack an arguable basis in either law or in fact," unless he can show that he was in imminent danger at the time he filed the complaint. If a court determines that an order allowing a plaintiff to proceed in forma pauperis was improvidently granted, the court should revoke the order. See, e.g., Polanco v. Hopkins, ___ F.3d ____, 2007 WL 4258724, at *3 (2d Cir. 2007) (affirming district court's revocation of plaintiff's in forma pauperis status and upholding constitutionality of § 1915(g)); Flemming v. Goord, No. 9:06-CV-562, 2007 WL 3036845, at *2 (N.D.N.Y. Oct. 16, 2007) ("When a court becomes aware of three prior strikes only after granting [in forma pauperis] status, it is appropriate to revoke that status and bar the complaint.").

B. Application

Mr. Sash has filed at least four frivolous or baseless actions. The Second Circuit has dismissed two of Mr. Sash's appeals after finding them to be frivolous. Sash v. Parks, No. 06-3602 (2d Cir. Jan. 12, 2007); Sash v. Clinton County, No. 04-0152

(2d Cir. Dec. 8, 2004). In addition, Mr. Sash filed two legal malpractice actions that were dismissed because they lacked a basis in law or fact. Sash v. Schwartz, No. 04 Civ. 9634, 2007 WL 30042 at *7 (S.D.N.Y. Jan. 4, 2007); Sash v. Dudley, No. 05 Civ. 7498, 2006 WL 997256, at *3 (S.D.N.Y. April 17, 2006), aff'd, 222 Fed. App'x 95 (2d Cir. 2007). Finally, Mr. Sash has not asserted that he falls within the imminent danger exception.

Conclusion

Because the PLRA bars Mr. Sash from proceeding in forma pauperis, I recommend that his complaint be dismissed without prejudice to being refiled upon payment of the required fee.

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Sidney H. Stein, Room 1010, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

James C. Francis IV

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
December 14, 2007

Copies mailed this date to:

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